No. 92-69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ICELEAN CLARK, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT BRIEF IN OPPOSITION OF RESPONDENTS KANSAS CITY, MISSOURI SCHOOL DISTRICT, ET AL., KALIMA JENKINS, ET AL., AND AMERICAN FEDERATION OF TEACHERS, LOCAL 691

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether any special and important issues of federal law are presented by the rulings of the lower courts, based on Missouri tax law, as well as clear and recent rulings of this Court, and pursuant to a broad remand order of this Court, that refunds of 1987 property taxes in the Kansas City, Missouri School District (KCMSD) should be limited to taxpayers who paid such taxes under protest, consistent with state law.

2. Whether any significant issue of law is posed by the lower courts' decisions that 1988 KCMSD property taxes were lawfully assessed, and that accordingly, no refunds thereof were appropriate, which rulings were based on fact findings as to respondent KCMSD's actions and motivations, and on the lower courts' interpretations of their own prior orders.

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OPINIONS BELOW

The decision below by the Court of Appeals has been reported as: *Jenkins v. Missouri*, 962 F.2d 762 (8th Cir. 1992). The district court's opinion is unreported.

COUNTERSTATEMENT OF THE CASE

Petitioners Icelean Clark, *et al.*, ask this Court to review the tax refund rulings that followed the Court's remand order in *Missouri v. Jenkins*, 495 U.S. 33 (1990) ("*Jenkins II*"). The decisions below involved the interpretation of a state statute, the application of clear principles of federal law, and judgments well within the discretion of the lower courts. These orders are unworthy

of this Court's scrutiny because Petitioners have presented no "special and important reasons" justifying this Court's review. Sup. Ct. R. 10.1.

In *Jenkins II* this Court held unlawful a district court decision to directly raise property taxes in the Kansas City, Missouri School District ("KCMSD" or the "District"),[1] *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987), and reversed the Court of Appeals, *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), "insofar as it allowed the tax increase imposed by the District Court to stand." 495 U.S. at 58. However, this Court affirmed "the modifications to the District Court's order made by the Court of Appeals," *id.* at 52, and remanded "for further proceedings consistent with [*Jenkins II*]," *id.* at 58. On remand, the lower courts handled Petitioners' tax refund claims in a manner consistent with the commands of this Court.

A. The Underlying Funding Orders

The district court ordered an increase in KCMSD property taxes as a last resort, and as a measure to fund desegregation obligations which the District otherwise could not meet, because of state law constraints on its capacity to raise revenues. *See* 495 U.S. at 40-41. KCMSD's funding obligations arose from a series of court orders holding both KCMSD and the State of Missouri liable for expenditures necessary to remedy severe conditions of school segregation within the KCMSD. *Id.* at 37-41.[2]

[1] The Kansas City, Missouri School District respondents include the school district itself and its Superintendent, Dr. Walter L. Marks.

[2] KCMSD brought the original complaint in this action against the State and a group of suburban school districts surrounding Kansas City, Missouri; KCMSD later was realigned as a defendant and separate counsel was retained to represent the plaintiff schoolchildren. The case went to trial on the plaintiffs' claims and the cross-claims of KCMSD against the State. *Id.* at 37. Following the

On September 15, 1987, the district court ruled that KCMSD needed an increase in its property tax levy, among other measures, in order to fund desegregation. After taking into account various factors, including KCMSD's historical property tax rates and rates prevailing in other school districts in the KCMSD region, the district court concluded that an increase in KCMSD's levy rate from $2.05 to $4.00 (per $100 of assessed valuation) was appropriate. The district court ordered such an increase into effect through fiscal year 1991-92. *Jenkins v. Missouri*, 672 F. Supp. at 411-13; *see Jenkins II*, 495 U.S. at 41-42.[3]

In an opinion issued August 19, 1988, the U.S. Court of Appeals for the Eighth Circuit "affirm[ed] the actions that the [district] court had taken to th[at] point." 495 U.S. at 42-43. The Eighth Circuit "held that . . . state-law limitations [preventing KCMSD from raising funds sufficient to meet its desegregation obligations] must fall to the command of the Constitution." *Id.* at 42. The Court of Appeals also left untouched the district court's finding that a $4.00 property tax rate was reasonable and necessary for the KCMSD. *See* 855 F.2d at 1314-16. In addition, the Court of Appeals sustained the district court's decision to directly order such a tax increase; however, it "required that in the future, the District Court should not set the property tax rate itself." *Id.* at 43. Rather, the Court of Appeals declared, KCMSD should

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district court's liability order, the American Federation of Teachers, Local 691, was allowed to intervene. This Court has on three occasions declined to review rulings approving the components of the district court's remedy. *See Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied, Kansas City, Missouri School District v. Missouri*, 484 U.S. 816 (1987); *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), *cert. granted in part on other issues*, 490 U.S. 1034 (1989); *Missouri v. Jenkins*, —— U.S. ——, 112 S. Ct. 437 (1991).

[3] The district court modified this order on October 27, 1987 in respects not relevant to the Petition.

adopt a levy on its own, within reasonable limits to be set by the district court, taking into account KCMSD's historical rates and the rates in neighboring school districts. *Id.* at 52; 855 F.2d at 1314, 1312. In reviewing several acceptable approaches to establishing such a limit, the Court of Appeals also explicitly approved at least one method that would have sanctioned a rate significantly higher than $4.00. *Id.*

The Court of Appeals recognized "that permitting the school board to set the levy itself would minimize disruption of state laws and processes and would ensure maximum consideration of the views of state and local officials." 495 U.S. at 43. In doing so, the Eighth Circuit set in motion " 'minimally obtrusive methods' " consistent with "principles of federal state comity." *Id.*

In April 1990, this Court ruled that the district court erred "in imposing the [KCMSD] tax [increase] itself" and that "[t]he Court of Appeals should not have allowed the tax increase to stand." 495 U.S. at 52. Accordingly, the *Jenkins II* decision "reversed the District Court in this respect," and remanded for the lower courts to correct this error. *Id.* The *Jenkins II* decision also affirmed "the modifications to the District Court's order made by the Court of Appeals." 495 U.S. at 52, 58. Indeed, this Court took care to explain that it did not view the forward-looking aspects of the Court of Appeals' order as dictum. Rather, the Eighth Circuit had modified an order that was effective prospectively, through fiscal year 1991-92, and had already required the school board—not the district court—to take the lead in setting the KCSMD tax levy. 495 U.S. at 52-53 n.18.

In approving the modified procedures ordered by the Eighth Circuit, this Court observed that they gave practical effect to the principle that "local authorities have the 'primary responsibility for elucidating, assessing, and solving' the problems of desegregation." 495 U.S. at 51. The Court also observed in this context that "no matter

has been more consistently placed upon the shoulders of local government than that of financing public schools." *Id.* at 52.

B. Actions Pursuant to the Modified Procedures

On September 13, 1988, the KCMSD Board of Education first took formal action to initiate a property tax increase—for fiscal year 1988-89—pursuant to the Court of Appeals' new procedures. The Board resolved, "pursuant to the August 19, 1988 opinion of the Eighth Circuit Court of Appeals," to ask the district court to approve a new reasonable maximum levy rate of $4.23 per $100 of assessed valuation. The Board agreed to submit such a rate to local tax authorities if the district court gave its approval by October 11, 1988, the deadline for assuring timely issuance of 1988-89 property tax bills. In the event that the district court failed to act by that time, the Board resolved to submit to local authorities the rate of $4.00, which the district court previously had found to be reasonable in its September 15, 1987 ruling. Pet. App. A47-A48.

The KCMSD Board next moved the district court to set a $4.23 levy rate limit for fiscal year 1988-89, indicating that the Board would officially set the levy at the new maximum rate once the court ruled. KCMSD also stated that if the Court of Appeals' mandate did not issue by October 11, 1988, thus arguably prohibiting the district court from timely approving a new reasonable maximum levy, the Board would adopt a levy of $4.00 for 1988-89, thereby not exceeding the rate previously deemed reasonable by the district court.[4]

The Court of Appeals issued its mandate on October 14, 1988. Three days earlier, as promised, KCMSD on its

[4] *See* "KCMSD Motion for Approval of a Maximum Property Tax Levy Rate and an Order Regarding Tax Abatements" (served September 21, 1988), at 3.

own had approved a levy rate of $4.00 for 1988-89, and submitted it to county tax collection officials. Pet. App. A43. Neither any of the original parties to this case, nor even Petitioners, objected to KCMSD's actions. On the contrary, in December 1988, Petitioners informed the district court they "agree[d]" with KCMSD that it had been the "appropriate course of action" for the District itself "to certify the present $4.00 rate . . . for the 1988-89 year," once the October 11, 1988 deadline had passed without the Court of Appeals' mandate being issued.[5]

On January 3, 1989, the district court denied KCMSD's still-pending motion to set a maximum tax levy rate of $4.23. The district court declared that because 1988-89 tax bills reflecting the $4.00 rate already had been sent, it was too late to authorize a new maximum levy for that year. Pet. App. A36.[6]

C. The Tax Protests

In 1987-88 and 1988-89, large numbers of KCMSD taxpayers paid the court-authorized $1.95 portion of their property taxes under protest, pursuant to state law, Mo. Rev. Stat. § 139.031, in order to challenge the legality of tax increases associated with funding desegregation. Approximately 9,000 taxpayers protested approximately $10.7 million in property tax payments for 1987-88. For 1988-89, approximately 10,000 taxpayers protested their

[5] Like KCMSD, Petitioners endorsed the $4.00 rate as reasonable under the circumstances, "pursuant to th[e District] Court's September 15, 1987 order" approving that rate. *See* "Amici Curiae Icelean Clark Et Al.'s Memorandum in Opposition to KCMSD's Motion for Approval of a Maximum Property Tax Levy Rate and For an Order Regarding Tax Abatements" (served December 7, 1988), at 4. Petitioners indicated they would challenge all desegregation-related tax increases not approved by the voters, but they did not contend the 1988-89 increase violated the Court of Appeals' modified procedures.

[6] The district court also held that KCMSD's request for a further increase in the levy rate to 4.23 for 1989-90 was premature. *Id.*

property tax payments of approximately $9.4 million. Pet. 4 n.4; 6 n.5. For both years, protests accounted for between 20% and 25% of all KCMSD property tax revenues attributable to the challenged tax increases.[7] One of the reasons so many taxpayers relied on state law tax protest procedures was public statements by Petitioners' counsel, at multiple press conferences, urging taxpayers to do so. *See* Pet. App. A9.

D. The Tax Refund Proceedings

The district court permitted Petitioners, eight individuals and three corporations subject to KCMSD's tax levy, to intervene in the *Jenkins* litigation to seek tax refunds for 1987-88 and 1988-89. Pet. App. A24. Although the Petition alleges the entitlement of all KCMSD taxpayers to refunds for the two years, Petitioners never sought class certification pursuant to Fed. R. Civ. P. 23, and no such relief ever was granted by the district court. The plaintiff schoolchildren, KCMSD and the State all opposed Petitioners' request for tax refunds, except for 1987-88 taxes paid under protest; none of the respondents opposed Petitioners' intervention request. *See* Pet. App. A13-A14.

The district court rejected Petitioners' claim for a full refund of all 1987-88 KCMSD property taxes collected pursuant to the $1.95 tax increase, regardless of whether filed under protest. Based on a careful analysis of state statutory and decisional law, the district court held that Mo. Rev. Stat. § 139.031, which limits refunds to taxpayers who paid under protest, "controls this case." Pet.

[7] Pursuant to Mo. Rev. Stat. § 139.031, these protested funds were held in escrow by Jackson County, Missouri officials. Pet. App. A14, A21. Petitioners acknowledged below that by fiscal year 1989-90, over 18,000 taxpayers made use of the protest process provided by Mo. Rev. Stat. § 139.031. *See* "Memorandum in Support of Intervenor Icelean Clark, Et Al.'s Motion to Recover Full Refund of Court-Ordered Property Taxes" (served June 15, 1990), at 7 n.3 (8th Circuit Joint Appendix at 59).

App. A18. The district court also denied Petitioners' claim that a refund process designed by the court itself, rather than application of the state statute, was required to afford Petitioners due process, under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). Instead, the district court held that *McKesson* provides strong support for application of Mo. Rev. Stat. § 139.031 in this case. Pet. App. A15-A17.

The Court of Appeals affirmed these rulings. It also turned back, as contrary to longstanding precedents of this Court, Petitioners' claim that they were denied due process because they had inadequate notice of an obligation to comply with the Missouri tax protest statute. Pet. App. A9.

With respect to 1988-89 KCMSD property taxes, the Court of Appeals sustained the district court's denial of any refund to Petitioners. Both courts refused to accept Petitioners' claims regarding the purpose and effect of the lower courts' prior orders. Likewise, they rejected Petitioners' interpretations of the actions of the KCMSD Board of Education. The lower courts also found baseless Petitioners' claim that *Jenkins II* establishes their entitlement to a full refund. Pet. App. A9-A10, A19-A21.

Petitioners continue to rely on a variety of factual contentions that were rejected by the lower courts. First, Petitioners assert that the KCMSD Board premised its resolution adopting a 1988-89 tax levy on the district court's 1987 direct tax increase order, which was later held invalid. Petitioners argue that this conclusion follows from the wording of tax levy resolutions adopted by the Board, and also from the date the Board adopted a $4.00 rate for 1988-89: October 11, 1988, three days before the Eighth Circuit's mandate issued. Pet. 5, 6, 18-22. Both lower courts held otherwise, concluding that KCMSD acted in accordance with the modified procedures first announced on August 19, 1988 by the Court of Appeals. Pet. App. A10.

Petitioners also maintain that the Court of Appeals' modified procedures were not satisfied for 1988-89 because the district court allegedly failed to approve a $4.00 levy for that year. Pet. 6. Once again, the lower courts reached directly contrary findings regarding the intent and effect of their own orders. Specifically, they held that the $4.00 levy rate approved by KCMSD on October 12, 1988 was the same rate the district court "obviously" had approved in 1987, and also " 'tacitly approved as reasonable' " in its January 3, 1989 order. Pet. App. A10. Furthermore, the Eighth Circuit has declared that it "fully effectuated" its "decision as to future taxing procedures . . . by issuance of its mandate" on October 14, 1988. *Id.* Thus, the modified procedures were in effect at the end of 1988, "by the time the billing and collection took place" for 1988-89 taxes, and accordingly, the taxes for that year " 'were collected lawfully.' " *Id.*

Icelean Clark, *et al.*, filed their Petition for Certiorari following the Court of Appeals' unanimous affirmance of the decision of the district court. Petitioners declined to seek en banc review in the Court of Appeals.

REASONS FOR DENYING THE WRIT

Petitioners present this Court with no basis to reconsider the rulings of the lower courts on remand of *Jenkins II*. Granting certiorari in this instance would simply require the Court to review findings of fact below, to reevaluate the lower courts' analysis of Missouri tax law, and to scrutinize the application of clear principles of federal law to the unique circumstances of this complex desegregation case.

The supposed importance of this case derives not from any conflicting decisions in the circuit court of appeals, or even from the possibility that its resolution will afford guidance for the future. Rather, its alleged significance derives almost entirely from the unprecedented nature of the judicial tax increase that led to these refund requests.

Yet the clarity of *Jenkins II*'s unanimous holding that a direct judicial tax increase was unlawful means that the issues Petitioners ask the Court to address likely will never arise again. Moreover, Petitioners have demonstrated no error in the lower courts' ruling much less an important question of federal law. Thus, no "special and important reasons" for review are posed by the Petition for Certiorari, Sup. Ct. R. 10.1, and it should be denied.

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE LOWER COURTS' DECISION TO LIMIT REFUNDS OF 1987-88 KCMSD PROPERTY TAXES TO TAXPAYERS WHO PAID UNDER PROTEST

Instead of showing "special and important reasons" justifying review of the lower courts' decisions limiting refunds of 1987-88 KCMSD property taxes, Sup. Ct. R. 10.1, Petitioners have presented theoretical alternative rulings on a variety of factual and legal issues. The Petition fails to demonstrate any adequate grounds for the Court to explore these questions.

The lower courts both held that provisions of a Missouri statute governing tax protests and refunds, Mo. Rev. Stat. § 139.031, apply to this case. The statute provides, in pertinent part:

> Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. . . .

Mo. Rev. Stat. § 139.031.1 (1987 Supp.) (amended 1989).[8] Based on a careful review of the text of the

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[8] Mo. Rev. Stat. § 139.031.2 requires public officials to maintain protested funds in escrow and sets forth procedures for taxpayers

statute, of State court decisions interpreting it, and of the unique circumstances of this case, the lower courts held that only those KCMSD taxpayers that protested their 1987-88 property tax increase were entitled to a refund. Pet. App. A10-A11, A18.

Petitioners urge this Court to reconsider several aspects of the lower courts' analysis of Section 139.031. In particular, they contest determinations that the statute applies, on its face, to "any taxes," including a property tax levy ordered by a federal court, rather than only to certain taxes levied by state authorities. Pet. 12; Pet. App. A7. Petitioners also dispute rulings below that a broad reading of the statute is supported by state court decisions applying Section 139.031 to "a variety of taxes." Pet. App. A7; Pet. 12. Third, Petitioners challenge the lower court's finding that determining whether a tax is covered by Section 139.031 is more complex than merely identifying "the origin of the levy," and requires an examination of such factors as how and by which authorities the tax is billed, to which authorities it is paid, which authorities benefit from revenues collected, and so on. Pet. App. A7; Pet. 13.[9] Finally, Petitioners dispute the lower courts' judgment that in light of the facts at issue, Section 139.031 applies to their refund requests.

Surely these issues of Missouri tax law are of insufficient consequence to warrant this Court's review. Furthermore, in some instances—such as the question whether "the federal trial court was the de facto taxing authority," Pet. 10—the matters raised by Petitioners are so fact-bound as to be inappropriate for this Court's docket.

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to initiate an action in state court seeking recovery of protested funds. *See* Pet. 11.

[9] Petitioners err in accusing the Court of Appeals of wholly discounting the importance of the "origin of the levy." Pet. 13. The Eighth Circuit simply suggested that the origin of the tax was only one relevant factor when considering the possible application of Section 139.031 to the court-ordered tax increase. Pet. App. A7.

It would be equally inappropriate for the Court to grant certiorari to review any of Petitioners' arguments against a partial 1987-88 refund that are based on federal law. The principal federal question on which Petitioners seek review is whether the district court violated principles of due process by relying on Section 139.031 and failing to devise a refund procedure on its own.

Both of the lower courts correctly ruled that this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), squarely supports their application of the Missouri tax protest statute, consistent with principles of due process. Pet. App. A7-A9. The Court of Appeals noted, in particular, that "*McKesson* . . . specifically approves the protest and escrow procedures that are at the heart of section 139.031." *Id.* A9.

McKesson held unconstitutional the State of Florida's refusal to provide certain taxpayers *any* opportunity for a refund of taxes they paid which were later held unlawful. This Court declared that a state may impose limits on taxpayers' rights to obtain a tax refund, after payment of taxes assessed, so long as those limits do not deny taxpayers "a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." Pet. App. A8 (*citing* 496 U.S. at 22, 110 S. Ct. at 2242). As both lower courts in this case recognized, *see* Pet. App. A8, A16-A17, *McKesson* establishes that reasonable limits on tax refunds serve important public goals. Such "procedural protections," the *McKesson* Court declared, "secure [a] State's interest in stable fiscal planning," and guard a State and its citizens "against any disruptive effects of a tax scheme's invalidation." 496 U.S. at 45-47, 50.

In describing specific limits on tax refunds that are consistent with due process, this Court said: "The State might for example provide by statute that refunds will be available only to those taxpayers paying under protest

. . . and/or place challenged tax payments into an escrow account." Pet. App. A8-A9 (*citing* 496 U.S. at 44-45, 110 S. Ct. 2254-55).[10] Under *McKesson*, the kind of mechanism provided by Section 139.031 clearly comports with due process. In light of this settled point of law, there exists no significant issue of federal law for the Court to address.

Nevertheless, Petitioners urge this Court to grant review to consider their assertion that "[t]he clear import of *McKesson* is that where a federal court unlawfully assumes the authority to levy and collect a tax, *the federal court* must provide taxpayers with notice and a meaningful opportunity to protest the tax and protect their right to a refund in order to satisfy [due process]." Pet. 16. For a host of reasons, this argument is far-fetched, and an unworthy basis for granting certiorari. First, because the court-ordered tax in this case was *sui generis*, Pet. 8, even if Petitioners had a plausible legal argument, there would be no significant value in agreeing to consider it. That is, no purpose would be served by establishing a precedent regarding a kind of taxation that is virtually certain never to recur, much less to require federal courts to adjudicate refund claims. Second, even if Petitioners are correct that the district court itself was required to adopt tax refund procedures that satisfy due process, then under *McKesson*, it did just that in relying on Section 139.031.[11]

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[10] In Section 139.031, Missouri has codified the traditional common law rule that protest at the time of payment is a condition precedent to recovery of an unlawful tax. *See George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 375 (1933). Several cases Petitioners cite for a contrary proposition, that taxpayers "forced to pay an unlawful tax against their will" are presumptively "entitled to a full refund," Pet. 9-10, simply do not establish any such rule. In fact, none of Petitioners' purported authorities say anything about tax refunds, and only one concerns taxes at all.

[11] In an effort to create a federal legal issue where none exits, Petitioners grossly distort *McKesson*, suggesting that it bars meas-

A close reading of the Petition suggests that Petitioners seek a ruling by this Court that because the district court was the author of the unlawful tax increase, it was constitutionally prohibited from relying on Section 139.031, and was required in order to satisfy due process to devise a wholly separate tax refund mechanism of its own (and presumably to establish a court-run bureaucracy to administer it). Petitioners seek certiorari in a quest for a decision that would undermine both *McKesson*, which approved measures such as Section 139.031, as well as the federal state comity principles announced in *Jenkins II*. Surely leaving undisturbed the lower court's reliance on state tax law and administrative practice would be more consistent with notions of federal judicial restraint—which explain this Court's rejection of a judicial tax increase—than would a ruling that the district court should have ignored state law on tax refund procedures.

In the past, "[c]onsiderations of federal state comity" have led the Court not to intervene in situations such as this; that is, when the Court has "held state taxes unconstitutional . . . it has [made a] practice to abstain from deciding the remedial effects of such a holding." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 176 (1990).

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ures such as Section 139.031, affording "remedies falling short of complete refund," in the event of a tax that "was beyond the state's power to impose," and that it sanctions such measures only in cases involving taxes that are "discriminatory." Pet. 16. Rather, *McKesson* simply reaffirmed that government violates due process whenever it does " 'not incur *any* obligation to pay . . . back' " unlawfully collected taxes. 496 U.S. at 39 (emphasis added) (citation omitted). Consistent with this principle, Florida was free to adopt "various procedural requirements on actions for post deprivation relief," such as those imposed by Section 139.031. *Id.* at 44. Because Section 139.031 facilitates refunds for those who pay under protest, however, Petitioners are flatly wrong in criticizing the lower courts for permitting the collection of a tax without recognizing "any obligation to require repayment once it is found unlawful." Pet. 17.

The Court's approach also indicates the district court acted properly in this case by deferring to state law, rather than asserting "itself in th[e] complex area of state tax structures." *Id.* (citation omitted).

Petitioners acknowledge that the due process analysis they ask this Court to undertake is distinctly fact-based. Respondents agree with Petitioners that "[w]hat constitutes a 'meaningful' opportunity to be heard is flexible, depending on the procedural protections demanded by particular situations." Pet. 15 (*citing, inter alia, Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). This observation simply confirms that it is proper to leave to the lower courts the question whether Section 139.031 satisfies due process in this instance. Granting certiorari would divert the Court from its role as a final arbiter of vital federal legal issues, and would simply cast the Court in the role of a fact-finder of last resort.

Finally, there is no merit whatever to Petitioners' request that the Court take this case in order to consider whether they received constitutionally adequate notice of their obligation to comply with Mo. Rev. Stat. § 139.031. That question poses no substantial federal legal issue. Rather, the Court of Appeals was plainly correct in holding, based on principles this Court established over a half century ago, that non-protesting KCMSD taxpayers must be held legally responsible for knowing about statutory remedies at their disposal. Pet. App. A9 (*citing, inter alia, Texaco, Inc. v. Short*, 454 U.S. 516, 532 n.25 (1982); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("[a]ll persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them")).

Unaccountably, Petitioners ignore this settled law. Instead they rest on a bare emotional appeal that this Court's intervention is needed to restore losses incurred by unwitting taxpayers. *See* Pet. 8-9, 17. Petitioners fail to demonstrate that this case is fundamentally different

from any other in which taxpayers have failed to use remedies afforded to them. Petitioners also make the frivolous assertion that Section 139.031 provides "no safeguards" for "KCMSD taxpayers who have never been parties to the desegregation litigation." Pet. 16. This charge fails to acknowledge that all such individuals and corporations receive KCMSD property tax notices, that btweeen 9,000 and 10,000 KCMSD taxpayers invoked Section 139.031 in 1987-88 and 1988-89, and moreover, that Petitioners' counsel themselves worked to publicize the availability of the state tax protest remedy. *See supra* at 6-7.

II. GRANTING CERTIORARI TO REVIEW THE DENIAL OF KCMSD PROPERTY TAX REFUNDS FOR 1988-89 WOULD BE INCONSISTENT WITH THIS COURT'S TRADITIONAL DEFERENCE TO FINDINGS OF FACT BY LOWER COURTS, AND WITH THE COURT'S BROAD REMAND ORDER

Petitioners ask this Court to review numerous findings of fact by the lower courts in connection with the denial of KCMSD property tax refunds for 1988-89. These findings concern the nature of the actions of the KCMSD School Board, as well as those of the district court and the Court of Appeals. The Petition fails to justify such a request for the Court to depart from its role as a "court of law, . . . , rather than a court for correction of errors in fact-finding." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). In fact, *Jenkins II* gave the lower courts a broad assignment on remand, thus recognizing the Court's traditional function and establishing the lower courts' primary responsibility for handling such questions as tax refunds.

Both lower courts made fact findings contrary to Petitioners' assertion that the 1988-89 levy increase was not "[t]imely [a]dopted [b]y [t]he Kansas City School Board." Pet. 18. They held "[t]he Board itself set the 1988 levy on October 11, 1988," Pet. App. A10, well be-

fore, as Petitioners put it, "the 1988[-89] levy was set, billed and paid." Pet. 19. As the Eighth Circuit observed, "there was nothing to prevent the board from taking action" in accordance with the Court of Appeals' August 19, 1988 decision prior to the issuance of the Court of Appeals' mandate on October 14, 1988. Pet. App. A10.

Petitioners also wish to relitigate factual issues regarding KCMSD's intentions that the lower courts have resolved in respondents' favor. First, Petitioners ask this Court to consider their claim that the KCMSD Board adopted a $4.00 levy for 1988-89, on October 11, 1988—based on the authority of the district court's 1987 tax increase order which this Court reversed—rather than on the authority of the Court of Appeals' August 19, 1988 modification of that order which this Court sustained. Pet. 21-23. In large part, Petitioners' claim is premised on the fact that the Court of Appeals' mandate issued three days after the KCMSD Board's October 11, 1988 resolution. *Id.* However, the lower courts rejected this argument because it failed to take full account of the date the Court of Appeals' opinion originally issued and the Board's intent to rely thereon.[12]

Petitioners also argue that references to the district court's September 15, 1987 order, in the KCMSD Board's resolutions of September 13 and October 11, 1988, demonstrate KCMSD's reliance on a judicial tax increase this Court later reversed. Pet. 21-22. But Petitioners already have presented these same factual arguments, premised on the same evidence, to both lower courts, with no success. *See* Pet. App. A6, A10.[13] The district court and the Court

[12] This simple finding regarding the chronology of events in this case fully refutes Petitioners' intemperate assertion that the lower courts must have used "telepath[y]," Pet. 21, in determining, prior to October 14, 1988, that KCMSD (and the district court) "understood who must set the levy for 1988." Pet. App. A20-A21; *see id.* A10.

[13] Likewise, Petitioners argue that a reference to the August 19, 1988 Eighth Circuit order in a KCMSD Board resolution of

of Appeals each held that KCMSD adopted a levy for 1988-89 based on the authority of the Eighth Circuit's August 19, 1988 opinion, which modified the tax increase procedures established by the district court, but did not disturb its findings regarding the reasonableness of the $4.00 rate. *Id.* In short, each of the factual premises of Petitioners' interpretations of the actions of the KCMSD Board has been rejected by both lower courts. Pet. App. 10.[14]

This Court has often declared that because it is a court of law, it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[15] Because Petitioners have failed to make such

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August 22, 1989, both establishes KCMSD's reliance in that year on the Court of Appeals' modified procedures, and corroborates KCMSD's reliance on the district court's 1987 order in prior years. Pet. 22-23. These factual assertions also were presented to and dismissed by the lower courts.

[14] The lower courts have not bothered to address another of the supposed "inconsistencies" identified by Petitioners. The KCMSD Board's simultaneous support for two different rates as "reasonable and necessary" in the Fall of 1988, *see* Pet. 21, plainly reflects the Board's attempt to argue in the alternative for a rate ($4.00) that already had been found to be reasonable and higher rate ($4.23) that the Board hoped the district court would find to be reasonable. Once the KCMSD Board decided time had expired to seek the higher rate for 1988-89, the Board set the lower rate for 1988-89, pursuant to the Eighth Circuit's modified procedures, and supported the higher rate only for 1989-90. See Pet. App. A4-A5, A9-A10. Petitioners' claim that this amounts to wanting to "have it both ways," Pet. 21, is meritless.

[15] *See, also, e.g., Tiffany Arts, Inc. v. United States*, 469 U.S. 310, 317-18 n.5 (1985) (noting "reluctance to disturb findings of fact concurred in by two lower courts"); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984) (Court accords "great weight to a finding of fact which has been made by a district court and approved

an "exceptional showing of error" with respect to the "concurrent findings of fact" discussed above, a decision to review the lower courts' rulings on these issues would be inconsistent with this Court's "traditional deference to the 'two-courts rule.'" *United States v. Ceccolini*, 435 U.S. 268, 273 (1978) (citation omitted).

Petitioners also propose that this Court sift through the lower courts' conclusions regarding the purpose and effect of several of their own rulings. This task also would put the Court in the inappropriate position of the finder of fact.

One of the key assertions in the Petition is that the Court of Appeals did not put into effect its modified procedures, first announced August 19, 1988, until after the billing and collection of the 1988-89 KCMSD property tax increase. Pet. 22. The principal assumption underlying this contention is that the Court of Appeals intended that the district court issue a separate order explicitly approving any 1988-89 levy rate chosen by KCMSD, including the $4.00 rate the district court previously had approved (as reasonable and necessary) in fact-findings the Eighth Circuit had declined to question. Petitioners also argue that the district court never issued such an order "before the 1988[-89] taxes were levied and paid"; in short, "KCMSD could not alone set this levy; the District Court had to approve it." Pet. 21.

This string of interpretations conflicts with the lower courts' own conclusions regarding the purposes of their orders. In particular, the Court of Appeals has stated that its modified procedures were "fully effectuated [in October 1988] by issuance of its mandate," and that as a result, the 1988-89 "taxes were collected lawfully" pursuant to those procedures. Pet. App. A10. Thus, the Eighth Circuit has made clear that in its view, no further

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by a court of appeals"); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (same).

steps were required by the district court in the Fall of 1988. With specific regard to district court approval of the 1988-89 levy rate, the Eighth Circuit has stated that the district court already "obviously" had approved the $4.00 rate as reasonable in 1987, and "tacitly" approved the same rate again in January 1989. Pet. App. A10. The district court also has ruled that under the circumstances presented in 1988, it was unnecessary to issue a separate order—prior to tax billing and collection—approving the $4.00 levy rate adopted by the KCMSD Board for 1988-89: "[T]here is no question that the KCMSD followed the modified procedure approved by the Eighth Circuit and affirmed by the Supreme Court. The proper focus is on what action the KCMSD took." Pet. App. A19. Respondents respectfully submit that this Court should defer to the lower courts' own judgments regarding implementation of their prior orders in light of the particular facts presented in 1988-89.

This Court is asked to grant certiorari, with regard to the denial of refunds for 1988-89 KCMSD property taxes, on the basis of one other claim: that *Jenkins II* contains a "clear interpretation of the effective date for the [Eighth Circuit's] modified tax scheme." Pet. 23. Petitioners' assertion is belied by the fact that the *Jenkins II* Court never addressed this issue directly, but only discussed it in a footnote, whose apparent purpose was to establish that "[t]he Court of Appeals' discussion of the procedures to be used in the future was not dictum." 495 U.S. at 52 n.18. This conclusion served as the predicate for Section IV of the Court's opinion, in which the Court affirmed the modified procedures.

Although this Court was surely "careful" in describing events that followed the Court of Appeals' decision, Petitioners unfairly and inaccurately suggest that the Court had at its disposal all it needed to compile a thorough "chronology" of the process of setting a property tax levy for 1988-89. Pet. 20. The record before this Court in

Jenkins II did *not* contain important materials bearing on the question of the effective date of the Court of Appeals' modified procedures. These include the KCMSD Board tax levy resolutions of September and October 1988, and the Board's Fall 1988 tax levy motion in the district court, all of which indicated the Board's intentions and actions to "itself set the levy" for 1988-89, at $4.00, pursuant to the modified procedures. Pet. App. A10.[16] These relevant evidentiary materials further demonstrated that the Eighth Circuit's modified procedures were "fully effectuated in 1988-89." Pet. App. A10.

Because this Court had before it important federal legal issues in *Jenkins II*, it issued a broad remand order, and did not prejudge the outcome of subsequent proceedings in the lower courts to undo the unlawful judicial tax increase. Moreover, because this Court could rely on the Eighth Circuit to interpret its own opinion—and if necessary, to summon a more complete evidentiary record—on the question of the effective date of its modified procedures, the Court had no need to issue, and flatly did not issue the "clear interpretation" which Petitioners have imagined.[17] As the district court stated below, this Court "avoided dictating the precise consequences of its ruling . . . that only tax increases imposed pursuant to the Eighth Circuit's revised procedures were valid," and di-

[16] When the KCMSD Board set the 1988-89 levy, within the limits previously established by the district court, it became unnecessary for the district court to reverse that portion of its 1987 order directly imposing such a levy for 1988-89. Thus, the documents not in the record in *Jenkins II* would have further informed the Court's observation—which is stated without an explanation—that "on January 3, 1989[, t]he District Court took no action to reverse its tax increase through fiscal year 1988-89." 495 U.S. at 53 n.18.

[17] In particular, there is no merit to Petitioners' suggestion, rejected by the lower courts, that the Court set the effective date of the modified procedures at fiscal year 1989-90 by placing an "s" at the end of the word "years" in the third sentence of Footnote 18. *See* Pet. 20; 495 U.S. at 53 n.18.

rected "the Eighth Circuit to determine whether the essential elements of the revised procedures were followed in setting the KCMSD property tax levy" for any of the fiscal years prior to this Court's decision. Pet. App. A20. The lower courts acted properly in accordance with these guidelines.

Petitioners' assertion that the lower courts misinterpreted this Court's legal and factual rulings in *Jenkins II* is unfounded. Thus, it provides a wholly inadequate basis for granting the Petition of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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